Supreme Court, U.S.
FILED
AUG 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-124

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

ROBERT S. TAFOYA,
Petitioner,

vs.

JAMES ADAMS, et. al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Stephen H. Kaplan
City Attorney

Geoffrey S. Wasson
Assistant City Attorney

1445 Cleveland Place
Room 303
Denver, Colorado 80202
(303) 575-2931

Attorneys for Respondents

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is it appropriate for this Court to consider the merits of of the District Court's Opinion and Order wherein the petitioner's claims under 42 U.S.C. § 1983 and § 1981 were dismissed on a motion for Summary Judgment.

2. Does the legislative history of the 1972 amendments to Title VII and the caselaw from this Court require that a Title VII plaintiff establish a basis for suit under 42 U.S.C. § 1983 and § 1981 which is independent of a violation of Title VII so that a claim under these civil rights statutes may be brought in the same proceeding with Title VII claims?

3. Did the petitioner here establish a basis for his claims under 42 U.S.C. §§ 1983 and 1981 which are independent of the employer's alleged commission of unlawful employment practices under Title VII.

4. Did the Court of Appeals err in determining that the petitioner failed to plead operative facts sufficient to support a claim under 42 U.S.C. § 1981?

LIST OF PARTIES

The respondents adopt the petitioner's statement contained in the petition for writ of *certiorari*.

TABLE OF CONTENTS

Page

OPINIONS BELOW 2
JURISDICTION 2
STATUTES INVOLVED 2
STATEMENT OF THE CASE 3
REASONS FOR DENYING THE WRIT 3
CONCLUSION 15
APPENDIX A ..... App. 1

TABLE OF AUTHORITIES

Cases — Page

Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) 9, 10

Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979) 4

Cole v. Choctaw County Board of Education, 471 F.2d 777 (5th Cir. 1973) 13

Day v. Wayne County Board of Auditors, 749 F.2d 1199 (6th Cir. 1984) 12

General Building Contractors Association v. Pennsylvania, 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982) 10

Great American Federal S & L Association v. Novotny, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979) 4

Green v. Illinois Dept. of Transportation, 609 F.Supp. 1021, (N.D. Ill. 1985) 12

Griggs v. Duke Power Co., 41 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) 10

Johnson v. Railway Express Agency, Inc. 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) 9

TABLE OF AUTHORITIES–Continued

Page

Manzanares v. Safeway Stores, Inc.,
593 F.2d 968, (1979) 11

Middlesex County Sewage Authority v. Sea Clammers,
453 U.S. 1, 101 S.Ct. 2615,
69 L.Ed.2d 435 (1981) 5

Owens v. Rush,
636 F.2d 283,
(10th Cir. 1980) 13, 14

Owens v. Rush,
654 F.2d 1370 (1981) 13

Preiser v. Rodriguez,
411 U.S. 475, (1973)
93 S.Ct. 1827,
36 L.Ed.2d 439 5

Ratliff v. City of Milwaukee,
608 F.Supp. 1109,
(E.D. Wis. 1985) 12

Rivera v. City of Wichita Falls,
665 F.2d 531,
(5th Cir. 1982) 12

Runyon v. McCrary,
427 U.S. 160,
96 S.Ct. 2586, 49 L.Ed.
2d 415 (1976) 10

TABLE OF AUTHORITIES–Continued

Page

Smith v. Robinson,
468 U.S. 992,
104 S.Ct. 3457, 82 L.Ed.
2d 746 (1984) 5

Tafoya v. Adams,
612 F.Supp 1097
(D.C. Colo. 1985) 12,14

Talley v. City of DeSoto,
37 F.E.P. Cases 375
(N.D. Tex. 1985) 13

Thigpen v. Roberts, 468 U.S.27,
104 S.Ct. 2916,
82 L.Ed.2d 23 (1984) 4

Torres v. Wisconsin Department of
Health & Social Services,
592 F.Supp 922
(E.D. Wis. 1985) 12,13

Trigg v. Fort Wayne Community Schools,
766 F.2d 299
(7th Cir. 1985) 12

Zewde v. Elgin Community College,
601 F.Supp. 1237,
(N.D. Ill. 1984) 12

OTHER AUTHORITIES

Statutes

42 U.S.C. 1981 ..... *Passim*

42 U.S.C. 1983 ..... *Passim*

42 U.S.C. 1985(3) 4

OTHER AUTHORITIES–Continued

Page

Education of the Handicapped Act,
20 U.S.C. 1400 5
Equal Employment Opportunity Act, 1972
Title VII ..... *Passim*
Federal Water Pollution Control Act,
33 U.S.C. 1251 5
Marine Protection Research
and Sanctuaries Act, 1972
33 U.S.C. 1401 5

Legislative Materials

House Report Number 238, 92nd Cong.
2nd Session *reprinted* in U.S. Code
Cong. & Ad News 2137, (1972) 6, 7, 8

No. 87-124

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

ROBERT S. TAFOYA,

Petitioner,

vs.

JAMES ADAMS, et. al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The respondents ask this Court to deny the petition for writ of certiorari whereby review would be taken of the April 21, 1987 judgment of the United States Court of Appeals for the Tenth Circuit in Tafoya, Plaintiff-Appellant, v. Adams, et al., Defendants-Appellees.

CITATIONS TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The respondents adopt the petitioner's statement contained in the petition for writ of *Certiorari.*

JURISDICTION

The respondents adopt the petitioner's statement with respect to the jurisdictional basis for the writ of *certiorari* set forth in the petition for writ of *certiorari.*

STATUTES INVOLVED

The respondents adopt the petitioner's citations of the relevant statutes and supplement the same with an additional statement with respect to the Civil Rights Act of 1964, as amended, Title VII, 42 U.S.C. 2000e. The respondents are providing Sections 701, 702, 703 and 704 of Title VII, 42 U.S.C. 2000e thru 2000e-3, which is set forth in Appendix A to this brief in opposition.

STATEMENT OF THE CASE

The respondents adopt the petitioner's statement of the case set forth in the petition for writ of *certiorari*.

REASONS FOR DENYING THE WRIT

The merits of the decision of the District Court dismissing the petitioner's claims under 42 U.S.C. § 1983 and § 1981 should not be reached by this Court. The merits of the decision of the district court can not be resolved by the straightforward application of controlling precedent. The legislative history preceding the 1972 amendments to Title VII and the case law from this Court requires that claims under 42 U.S.C. § 1983 and § 1983 have an independent basis from an asserted violation of Title VII because an employer committed an unlawful employment practice. The respondents will demonstrate that the claims asserted under § 1983 and § 1981 do not have a viable basis independent of the asserted violation of Title VII. The petitioner's complaint does not set forth operative facts which are sufficient to support claims under 42 U.S.C. § 1983 or § 1981.

I.

The respondents do not dispute that the merits of the District Court's order dismissing the petitioner's claims under 42 U.S.C. § 1983 and § 1981 were argued and briefed in the District Court and in the Court of Appeals. However the resolution of the issue presented below and not reached by the Court of Appeals can not be decided by a simple and "straightforward application

of controlling precedent." *Thigpen* v. *Roberts,* 468 U.S. 27, 33, 104 S.Ct. 2916, 82 L.Ed.2d 23 (1984). The petitioner's assertion that review should be granted "... because (of) the confusion, conflict and mixed signals on this question in the decisions of the circuit courts ..." demonstrates the lack of "controlling precedent" that can be applied in a straightforward fashion to resolve an important issue of substance. See the petition for writ of *certiorari,* p. 6.

II.

This Court has held that §1983 does not itself create substantive rights. *Chapman* v. *Houston Welfare Rights Organization,* 441 U.S. 600, 616-18, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979).

In *Great American Fed. S. & L. Association v. Novotny,* 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979) this Court addressed the question of whether a retaliatory discharge in violation of Section 704(e) of Title VII (42 U.S.C. 2000e-3(a)) could become the basis for a violation of 42 U.S.C. § 1985(3). This Court noted that "(s)ection 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Novotny,* at 442 U.S. 372. This Court held that a "...deprivation of a right created by Title VII cannot be the basis for a cause of action under 1985(3)," *Novotny,* at 442 U.S. 378. This Court's holding was premised in part upon a finding that an action under § 1985(3) would allow a plaintiff to avoid the comprehensive procedural remedial purposes of Title VII.

This Court has examined the interplay between § 1983 and other more specific remedial statutes and concluded that the cause of action is confined to the more precise statutes. In *Preiser* v. *Rodriguez,* 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) this Court held that where a statute provides a particular procedure and an exclusive remedy for violation of the statute, § 1983 may not be used to obtain additional remedies. In *Middlesex County Sewage Authority* v. *Sea Clammers,* 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981), this Court held that the detailed scheme and particular remedies written into the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et. seq.* and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1401, *et. seq.* precluded the simultaneous invocation of 1983.

In *Smith* v. *Robinson,* 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed. 2d 746 (1984), this Court held that the Education of the Handicapped Act, 20 U.S.C. § 1400, *et. seq.* (EHA) precluded the assertion of equal protection claims which were virtually identical to the EHA claims. This Court in *Smith* observed that it will not lightly determine that Congress intended to foreclose reliance on § 1983 for substantial federal claims, but that Congress does have the authority to replace a § 1983 cause of action with regard to particular rights by providing an exclusive remedy elsewhere. The legislative history of the 1972 amendments to Title VII demonstrate that Congress intended to limit reliance on both § 1983 and § 1981 claims of discrimination in the employment setting.

Title VII as enacted in 1964 only applied to the private sector. Public sector employers such as respondent Denver became subject to Title VII when it was amended in 1972. The legislative history preceding the 1972 amendments to Title VII discussed the interplay between Title VII and 42 U.S.C. § 1981 and § 1983. The House Committee Report addressed the need to bring state and local governments within the ambit of Title VII stating:

> While an individual has a right of action in the appropriate court if he has been discriminated against, the adequacy of protection against employment discrimination by state and local governments has been severely impeded by the failure of the Congress to provide Federal administrative machinery to assist the aggrieved employee.
>
> ...
>
> State and local governments constitute the only large group of employees in the nation who are almost entirely exempt from Federal nondiscrimination protections. Although the aggrieved individual may enforce his rights directly in the Federal district courts, this remedy ... is frequently an empty promise due to the expense and time involved in pursuing a Federal court suit.
>
> ...
>
> The Committee feels that it is an injustice, to provide employees in the private sector

> with an administrative forum in which to redress their grievances while at the same time, denying similar protection to the increasing number of state and local employees. Accordingly, H.R. 1746 provides the administrative remedies available to employees in the private sector should also be extended to state and local employees.

H. R. Rep. No. 238, 92nd Cong., 2nd Session *reprinted in* U.S. Code Cong. & Ad. News 2137, 2153-54 (1972). The House committee then directly addressed the impact of extending Title VII to state and local governments upon an individual's ability to maintain suit under §§ 1981 and 1983 stating:

> In establishing the applicability of Title VII to state and local employees, the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1870 and 1871, 42 U.S.C. §§ 1981 and 1983, is in no way affected...
>
> Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination...The remedies available to the individual under Title VII *are co-extensive* with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that

the *two* procedures augment each other and are not mutually exclusive. The bill, therefore, by extending jurisdiction to State and local government employees does not affect the *existing rights* that such individuals have already been granted by previous legislation.

H. R. Rep. No. 238, 92nd Cong., 2nd Session, *reprinted in* U.S. Code Cong. & Ad. News 2137, 2154 (1972) (emphasis added).

Prior to the extension of Title VII to state and local governments in 1972, the governmental employee did not have any *existing rights* under Title VII. This congressional limitation of § 1981 and § 1983 suits to rights that existed prior to the inclusion of state and local governments would bar subsequent § 1981 and § 1983 suits which were premised upon the state or local governments alleged commission of unlawful employment practices prohibited by Title VII.

The legislative history quoted above demonstrates that Congress recognized that the extension of Title VII to state and local governments created new and additional statutory rights for employees in the public sector. The Congress took care to state that the inclusion of state and local governments within Title VII's ambit did not extinguish the *existing* rights that had been granted by previous legislation, 42 U.S.C §§ 1981 and 1983. The Congress clearly stated that the procedures under Title VII, § 1981, and § 1983 augment one another. The Congress stated that the statutory remedies are not mutually exclusive. Equally significant the legislative history does not state nor even suggest that the statutes are *mutually inclusive* nor does this

Court's analysis of the relationship between §§ 1983 and 1981 suggest that the statutes are mutually inclusive.

This Court has not addressed the question of whether a violation of Title VII is included within a claim brought under § 1981. This Court's examination of the interplay between Title VII and §§ 1981 and 1983 has focused on the question of whether Title VII excluded a cause of action under either §§ 1981 or 1983. This Court's treatment of the exclusion issue emphasizes the distinctions between Title VII and § 1981.

In *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) this Court addressed the question of whether the timely filing of a charge of employment discrimination with the Equal Employment Opportunity Commission tolled the running of the statute of limitations applicable to an action based upon the same facts instituted under § 1981. *Johnson,* at 421 U.S. 455. This Court stated that "(s)ection 1981 is not coextensive in its coverage with Title VII." *Johnson,* at 421 U.S. 460. This Court held that "the remedies under Title VII and under § 1981, although related and although directed to most of the same ends, are *separate, distinct,* and *independent.*" *Johnson,* at 421 U.S. 461 (emphasis added).

This Court earlier held that an employee's presentation of a discrimination claim to final arbitration under a non-discrimination clause of a collective bargaining agreement did not bar a later Title VII case. *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 38, 94

S.Ct. 1011, 39 L.Ed.2d 147 (1974). This Court recognized the "... distinctly separate nature of the *contractual* and *statutory rights* ..." in holding that the submission of a grievance to arbitration was a vindication of a contractual right under a collective bargaining agreement while the Title VII suit represented the assertion of independent statutory rights conferred by Congress with the enactment of Title VII. *Gardner-Denver,* at 415 U.S. 49-50 (emphasis added).

In *General Building Contractors Assn.* v. *Pennsylvania,* 458 U.S. 375, 383 S.Ct. 3141, 73 L.Ed. 2d 835 (1982), this Court refused to impose liability under the disparate impact analysis of Title VII articulated in *Griggs* v. *Duke Power Co.,* 41 U.S. 424, 430, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) in a case brought under 1981 without proof of intentional discrimination. This Court held that § 1981 could be violated only by showing of "purposeful discrimination." *General Building Contractors Assn.,* at 458 U.S. 391. This Court noted that Congress intended to protect a limited category of rights under 1981, specifically defined in terms of racial equality. *General Building Contractors Assn.,* at 458 U.S. 384. In deciding *General Building Contractors Assn.* this Court referred to *Runyon* v. *McCrary,* 427 U.S. 160, 170-171, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) where this Court had held that § 1981 would be violated "if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees." This Court's reference to *Runyon* v. *McCrary, supra,* emphasizes the contractual rights protected by § 1981 that were at issue in *General Building Contractors Assn.,*

supra. The Tenth Circuit has recognized that "Title VII and § 1981 are are not identical." *Manzanares* v. *Safeway Stores Inc.*, 593 F.2d 968, 971 (10th Cir. 1979).

These decisions where this Court has examined §§ 1981 and 1983 in conjunction with Title VII disclose that this Court clearly recognizes that a violation of Title VII without more does not become a violation of either §§ 1981 or 1983.

In paragraphs numbered 6 through 16 of the complaint the petitioner sets forth the factual allegations which formed the basis of the alleged unlawful activity on the part of the respondents. In paragraph 17 of the complaint the petitioner asserted that as a result of those acts he "has been and is continuing to be denied his right to equal employment opportunity..." The alleged misconduct of the respondents set forth in the complaint if proved at trial would be unlawful employment practices prohibited by Title VII, Section 703 (a) (1) and (2) and Section 704 (a). Section 703 (a) (2) prohibits an employer from "... limit(ing), segregat(ing), or classify(ing) his employees ... in any way which would deprive or tend to deprive any individual of *employment opportunities* or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."(Emphasis added). The scope of Title VII's reach into the employment practices of this country has been broadly and expansively defined by cases to numerous to recount here. The scope and breath of Title VII clearly extends far beyond the relatively narrow reach of § 1981's guarantee that all persons shall have the right to make

and enforce contracts on the same footing as white citizens. In this case the petitioner seeks to vindicate his Title VII guarantee of equal employment opportunities under §§ 1981 and 1983. These rights did not exist prior to the 1972 amendments to Title VII. The legislative history clearly shows that claims under § 1981 and § 1983 where to be limited to existing rights and thus an asserted denial of "equal employment opportunity" can not form the basis for suits under §§ 1981 and 1983.

The District Court's holding that "...(i)t is inconsistent with the general statutory scheme of Title VII to permit the consideration of Title VII claims and § 1981 and § 1983 claims based upon Title VII in the same lawsuit..." has substantial support in the cases decided by this Court and discussed above. *Tafoya* v. *Adams*, 612 F.Supp. 1097, 1102 (D.C.Colo. 1985). The District Court's holding that a Title VII plaintiff may assert violations of §§ 1981 and 1983 along with a Title VII claim as long as the claims under §§ 1981 and 1983 are independent and are not based upon violations of rights set forth in Title VII has been followed by a majority of the Courts which have addressed the issue. See *Rivera* v. *City of Wichita Falls*, 665 F.2d 531, 534 n.4 (5th Cir. 1982); *Day* v. *Wayne County Board of Auditors*, 749 F.2d 1199 (6th Cir. 1984); *Trigg* v. *Fort Wayne Community Schools*, 766 F.2d 299 (7th Cir. 1985); *Green* v. *Illinois Dept. of Transportation*, 609 F.Supp. 1021, 1027 (N.D. Ill. 1985); *Zewde* v. *Elgin Community College*, 601 F.Supp. 1237, 1245-1246 (N.D. Ill 1984); *Ratliff* v. *City of Milwaukee*, 608 F.Supp. 1109, 1128 (E.D. Wis. 1985); *Torres* v. *Wisconsin Department of*

Health & Social Services,592 F.Supp. 922 (E.D. Wis. 1985); *Talley* v. *City of DeSoto*, 37 F.E.P. Cases 375 (N.D. Tex. 1985).

III

The petitioner in this case has failed to plead a colorable § 1983 claim such as a claim for the deprivation of a liberty interest or discharge for exercising first amendment rights. See the Tenth Circuit's carefully considered examination of this issue and its involvement with Title VII in *Owens* v. *Rush*, 654 F.2d 1370 (10th Cir. 1981) and *Owens* v. *Rush*, 636 F.2d 283 (10th Cir. 1980), two separate cases arising out of the same nucleus of facts. See *Cole* v. *Choctaw County Board of Education*, 471 F.2d 777 (5th Cir. 1973) where jurisdiction was premised under 42 U.S.C. §§ 1981 and 1983 and is clear that liability was premised under § 1983 for the governmental employer's unlawful imposition of a penalty (failure to rehire) because the employee had exercised her first amendment right of free speech.

IV

The respondents do not dispute that the pretrial order appears not to have been examined or considered by the Court of Appeals below. The pretrial order clearly stated that:

> The Plaintiff claims that he was discriminated against by the defendants regarding the terms and conditions of his em-

> poyment because of his national origin, Mexican-American, and because he had previously opposed employment practices which he reasonably believed to be unlawful.

Appendix D, Paragraph II A of the pretrial order attached to the petition for writ of *certiorari*. This statement fails to cure the fatal defects found in the petitioner's complaint. Section 1981 provides the guarantee that all persons shall have the same right to make and enforce contracts as is enjoyed by white citizens. The petitioner's complaint does not allege that he was not allowed to make a contract with any of the respondents. The complaint nowhere alleges that the petitioner had entered into a contract which he was denied the right of enforcement. These are the essential elements of a claim under § 1981 and they were not pled.

The District Court exercised the requisite degree of caution prior to dismissing the petitioners claims under §§ 1981 and 1983. *Tafoya* v. *Adams, supra.* at 1103. This case now before the Court is not unlike that of the plaintiff in *Owens* v. *Rush,* 636 F.2d 283 (10th Cir. 1980) where the Tenth Circuit noted that "... (a)lthough plaintiff could possibly have presented a colorable § 1983 claim for deprivation of a liberty interest or discharge for exercising first amendment rights, her second amended complaint did not adequately present such claims..." *Owens* v. *Rush, supra.* at 636 F.2d 285. It is possible that the petitioner here, Tafoya, could have presented a colorable claim

under § 1981 that he was denied the same right to make and enforce a contract as is enjoyed by a white citizen, but his complaint and his response to the defendants' motion for summary judgment failed to state a basis for such a claim. The petitioner's complaint and response to the motion for summary judgment fails to state any basis to support a claim for the denial of any constitutional rights thus giving viability to a claim under § 1983.

CONCLUSION

The Opinion and Order of the District Court does not erroneously depart from the legislative history which recognized that claims presented under §§ 1981 and 1983 must have a basis independent from a violation of the rights created and protected by Title VII. The District Court does not misapply the case law from this Court. The District Court's reasoning and conclusion of law are in accord with the majority of the other courts which have considered the issues raised in this case. The District Court's analysis and resolution of the issues in this case is firmly established by the prior decisions where this Court has examined the viability of § 1983 claims where a remedial statute has its own detailed and comprehensive enforcement scheme and his Court's examination of § 1981 claims in conjunction with Title VII. The Court of Appeals correctly ruled that the petitioner's complaint was deficient though on a different ground than that stated in the decision of the Court of Appeals.

The respondents respectfully submit that the proper disposition of this appeal is to deny the writ of *certiorari*.

Respectfully submitted,

STEPHEN H. KAPLAN
City Attorney

GEOFFREY S. WASSON
Assistant City Attorney
Attorneys for Respondents
1445 Cleveland Place,
Room 303
Denver, Colorado 80202
Telephone: (303) 575-2931

TITLE VII
(1972 Amendments appear in italics)

Sec. 701. For the purposes of this title--

(a) The term "person" includes one or more individuals, *governments, governmental agencies, political subdivisions,* labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has *fifteen* or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or *any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code),* or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, *except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972,* persons having fewer than *twenty-five* employees (and their agents) shall not be considered *employers.*

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to

procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) *twenty-five* or more during the first year after the *date of enactment of the Equal Employment Opportunity Act of 1972, or* (B) ~~*fifteen*~~ or more thereafter, and such labor organization-

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, *except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the*

qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, *and further includes any governmental industry, business, or activity.*

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) *The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's, religious observance or practice without undue hardship on the conduct of the employer's business.*

EXEMPTION

Sec. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, *educational institution,* or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, *educational institution,* or society of its *activities.*

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

Sec. 703. (a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization-

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, *or applicants for membership* or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or

institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if-

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties

of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any appreciceship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

Sec. 704.

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee

controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment *agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,* to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment *agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee* indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.